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No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington State Court of Appeals, Division III

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888

Mary Price
Families Against Mandatory Minimums
1612 K Street, N.W., Suite 700
Washington, DC 20006
(202) 822-6700

David M. Porter
Counsel of Record
National Association of Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that findings that impact the length of criminal sentences are made according to constitutionally required procedures.

Families Against Mandatory Minimums (FAMM) is a nonprofit, nonpartisan organization with nearly 30,000 members and forty chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive costs of mandatory minimum sentencing. The costs are not limited to public expenditures but include the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and culpability of the offender.

Both the NACDL and FAMM have appeared as *amici curiae* in this Court on numerous occasions, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases applying *Apprendi*. *See, e.g., United States v. Cotton*, 535 U.S. 625 (2002). Because the decision below is contrary to the rule set forth by this Court in *Apprendi* and irreconcilably

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

conflicts with the highest court of another state, NACDL and FAMM respectfully submit this brief *amici curiae* in support of Petitioner.

SUMMARY OF ARGUMENT

Where a state sentencing scheme requires the existence of aggravating factors in order to depart upward from statutorily imposed sentencing guidelines, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), mandates that such factors be found by a jury beyond a reasonable doubt. Where, as here, these factors are found only by a judge under a preponderance of evidence standard, *Apprendi* does not allow a sentence in excess of the statutory guideline range.

Apprendi holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The aggravating factors found in this case increased Petitioner's sentence beyond the maximum allowed by the statutory sentencing guidelines. Thus, these facts are precisely the sort that must be proven to a jury beyond a reasonable doubt. Imposing an upward departure based solely on a ***judge's*** finding of aggravating factors contravenes *Apprendi*'s fundamental holding.

The Washington courts mistakenly hold that *Apprendi* does not apply because another statutory provision limits the total sentence that may be imposed in the event of an upward departure. But to accept this logic would render *Apprendi* meaningless—a state could circumvent *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.

Indeed, the Washington courts' application of *Apprendi* directly conflicts with a recent decision of the Kansas Supreme Court, which held that *Apprendi* required a jury finding beyond a reasonable doubt in order to impose an upward departure from Kansas' structurally identical statutory sentencing guidelines. There is a pressing need to resolve this conflict, because many other states have statutory guidelines systems like Kansas and Washington, and others have sentencing schemes that implicate similar *Apprendi* issues. Yet more states are considering adopting sentencing guidelines, and they too will benefit from guidance by this Court on this exceptionally important issue.

Finally, granting certiorari in this case would not threaten the federal sentencing guidelines because the federal guidelines are set by the United States Sentencing Commission, not by statute. The application of *Apprendi* to ***statutory*** maximum sentences, on the other hand, is well established.

Resolving the conflict over *Apprendi*'s effect on upward departures from state statutory sentencing guidelines is critically important for practitioners, defendants, judges, and lawmakers throughout the country. This issue is a pure question of law concerning the scope of *Apprendi*, and there is nothing to be gained by delaying resolution by this Court. To allow the present state of uncertainty to continue will perpetuate confusion within the criminal justice system and impair the faithful application of *Apprendi*.

ARGUMENT

I. *Apprendi* Requires that Any Fact Necessary for an Upward Departure from a Statutory Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt.

Under Washington's sentencing statute, the court must impose a sentence within the statutory guidelines range unless it finds that "aggravating factors" justify an exceptional sentence upward. *State v. Gore*, 143 Wn.2d 288, 313, 21 P.3d 262 (2001); *see also* Wash. Rev. Code § 9.94A.120(1), (2) (2000) (providing that "the court ***shall*** impose a sentence within the sentence range for the offense" unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence") (emphasis added).[2] The existence of such aggravating factors is precisely the kind of finding that must be made by a jury beyond a reasonable doubt under *Apprendi*. Washington law, however, allows such findings to be made by a judge, under a preponderance of the evidence standard. *See id.* § 9.94A.370(2) (2000).

In this case, the upward departure was based on the aggravating factor of domestic violence committed with deliberate cruelty and within the sight or sound of the victim's minor child. *See* Wash. Rev. Code § 9.94A.390(2)(h)(ii), (iii) (2000).[3] This factor—and this factor alone—enabled the court to impose a sentence in

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[2] Although Washington has recently recodified parts of its sentencing laws, the standards governing upward departures remain the same. *See* Wash. Rev. Code §§ 9.94A.505(2)(a)(i), 9.94A.535 (2002).

[3] The trial court also found "deliberate cruelty" to be an independent, additional aggravating factor, *see* Wash. Rev. Code § 9.94A.390(2)(a) (2000), but the appellate court affirmed only the domestic violence aggravator. *See* Pet. App. 16a-17a.

excess of the statutory maximum set forth in Washington's sentencing guidelines. As a result, Petitioner received a 90-month sentence, more than three years longer than the maximum sentence allowed by the statutory standard range absent a finding of aggravating factors.

Under *Apprendi*, the facts underlying such an upward departure from a statutory sentencing guidelines range must be found by a jury beyond a reasonable doubt:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (citations and quotation marks omitted).

Thus, *Apprendi* dictates that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494 (footnote omitted). The answer to that question in this case is an unequivocal yes. The court's finding of aggravating factors exposed Petitioner to a sentence greater than the statutory maximum sentence he would have faced absent such factors. These aggravating factors are what "increase[d] the prescribed range of penalties to which [Petitioner was] exposed." *Id.* at 490.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court explained *Apprendi* as follows:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty ***exceeding*** the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Id. at 602 (citing *Apprendi*, 530 U.S. at 482-83) (emphasis in original) (quotation marks omitted).

Washington's statutory sentencing scheme provides that "the court ***shall*** impose a sentence within the sentence range for the offense" unless aggravating factors exist. Wash. Rev. Code § 9.94A.120(1), (2) (2000) (emphasis added). Thus, imposing a sentence beyond the guideline range is "contingent on the finding" of such aggravating factors and, under *Apprendi*, this finding must be made "by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

This Court's application of this straightforward principle to the facts of *Apprendi* is instructive. Mr. Apprendi pled guilty to unlawful possession of a firearm, the sentencing range for which was 5 to 10 years. *See Apprendi*, 530 U.S. at 468. At sentencing, the state court found by a preponderance of the evidence that Apprendi's crime was racially motivated, and enhanced Apprendi's sentence under New Jersey's hate crime statute. *See id.* at 471. Based on this finding, the court sentenced Apprendi to a 12-year prison term. *Id.*

This Court held that the hate crime finding could not be the basis for enhancing Apprendi's sentence beyond the statutory maximum for his gun possession offense, where that finding had not been made by the jury beyond a reasonable doubt. It reasoned:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Id. at 476. Here, the State of Washington threatened Petitioner with certain pains (the statutory standard guidelines) for kidnapping a person. It threatened him with additional pains (an upward departure beyond the maximum allowed by those guidelines) for exercising deliberate cruelty in connection with domestic violence. Thus, as in *Apprendi*, a jury finding beyond a reasonable doubt is necessary to authorize a sentence beyond the maximum set forth in the statutory standard range.

Washington courts, including the court below, have consistently rejected attempts to apply *Apprendi* to upward departures from the statutory sentencing guidelines. *See Gore*, 143 Wn.2d at 311-15; *State v. Taylor*, 111 Wn. App. 519, 524-25, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003); *State v. Blakely*, 111 Wn. App. 851, 870-71, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889 (2003); *State v.*

Urlacher, 111 Wn. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002); *State v. Buchanan*, 110 Wn. App. 1031, 2003 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003); *State v. Ramires*, 109 Wn. App. 749, 37 P.3d 343, 353, *review denied*, 52 P.3d 521 (2002). Instead, Washington state courts have erroneously concluded that *Apprendi* does not apply to such upward departures because a separate statutory provision limits the size of such a departure for particular felonies. The leading Washington Supreme Court case relies on the fact that an upward departure from the statutory guidelines may not result in a sentence greater than the ceilings imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wn.2d at 313-14. For Petitioner's Class B felony conviction, § 9A.20.021 precludes the court from imposing an exceptional sentence of greater than 10 years.[4]

The mere fact that Washington law contemplates that some Class B felony convictions might result in a 10-year sentence does not thwart the application of *Apprendi* to an upward departure from the statutory sentencing guidelines. This Court rejected this logic in *Ring*, where the State made an identical argument in connection with Arizona's capital sentencing scheme. Because the Arizona statute "specifies 'death or life imprisonment' as the only sentencing options" for first degree murder, the State argued that the jury's first-degree murder conviction alone authorized the judge to sentence within this "range of punishment" up to and including the death penalty. *Ring*, 536 U.S. at 603-04 (citations omitted).

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[4] For class A felonies, the sentence may not exceed life imprisonment; for class C felonies, the sentence may not exceed 5 years imprisonment. *See* Wash. Rev. Code § 9A.20.021(1)(a), (c) (2000).

This Court concluded that *Apprendi* flatly precluded such reasoning:

> This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict. The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting.

Id. at 604 (citations and quotation marks omitted).

Likewise, the Washington statute "authorizes a maximum penalty of [10 years] only in the formal sense." *Id.* In effect, Washington's sentencing scheme specifically requires a finding of aggravating factors in order to depart upward from the statutory sentencing guidelines. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000). To accept the logic employed by the Washington courts would truly render *Apprendi* "a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604. A state could avoid *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.[5]

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[5] Accordingly, the Washington Supreme Court's reliance on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), is misplaced. *See*

Apprendi does not and cannot condone such an absurd result. Rather, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83). Washington law expressly provides that Petitioner's sentence in excess of the statutory guideline range was contingent on the finding of aggravating circumstances. Thus, those circumstances must be found by a jury beyond a reasonable doubt.

II. State Courts Have Split Over the Application of *Apprendi* to Upward Departures from Statutory Sentencing Ranges, and this Issue Affects States Throughout the Country.

The Washington court's refusal to apply *Apprendi* to upward departures from statutorily imposed sentencing guidelines directly conflicts with the holding of the Kansas Supreme Court in *State v. Gould*, 23 P.2d 801 (Kan. 2001). The sentencing schemes in Washington and Kansas are structurally identical:

(1) Both contain a statutorily imposed sentencing grid that establishes presumptive sentencing ranges;

Gore, 143 Wn.2d at 314. *Apprendi* expressly limited *McMillan* to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Here, absent aggravating factors, Petitioner's statutory maximum was the top of the sentencing guidelines range (53 months). Because the court imposed a sentence of 90 months, this case ***does*** "involve the imposition of a sentence more severe than the statutory maximum established by the jury verdict." *Id.*

(2) Both condition any upward departure from the standard range on a finding of one or more aggravating factors;

(3) Both provide that such aggravating factors must be substantial, compelling, and not already included in the elements of the underlying offense; and

(4) Both provide additional statutory limits on the total sentence that may be imposed when the court departs from the standard guidelines range.

See Petition for Certiorari ("Pet.") 9.

The Washington Supreme Court found that upward departures from the presumptive sentencing range did not implicate *Apprendi*. *See Gore*, 143 Wn.2d at 311-15. The Kansas Supreme Court, however, required that the aggravating factors underlying such a departure must be proven to a jury beyond a reasonable doubt. *See Gould*, 23 P.3d at 812-13. The Kansas court reasoned that "[u]nder *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict." *Id.* (citing *Apprendi*, 530 U.S. at 469, 490-96). Where the existence of aggravating factors has not been decided by a jury beyond a reasonable doubt, the only "authorized" sentence is the one set forth in the presumptive sentencing grid. *See id.* at 813. In that situation, the court violates *Apprendi* if it imposes a sentence "beyond the maximum sentence in the applicable grid box." *Id.*

The split between Kansas and Washington is irreconcilable. Despite the identical structures of each state's sentencing scheme and mutual reliance on *Apprendi*, a

Kansas defendant may not be sentenced in excess of the standard range unless a jury has found aggravating factors beyond a reasonable doubt, whereas a Washington defendant may receive an upward departure based solely on a judge's finding by a preponderance of the evidence.

The importance of this issue extends beyond Kansas and Washington. Numerous other states have sentencing guideline ranges that are mandatory unless aggravating factors are found. *See* Pet. 16-17 & n.7. Still more states have sentencing schemes that raise similar issues under *Apprendi*, even though they have not codified sentencing guidelines per se. *Compare People v. Swift*, 781 N.E.2d 292 (Ill. 2002) (holding that sentence for first degree murder could not exceed 60 years under *Apprendi*, even though statute allowed longer sentences if certain aggravating factors were present, because jury had not found that such factors existed), *cert. denied*, 123 S. Ct. 1803 (2003), *with People v. Rivera*, 62 P.3d 1056 (Colo. App. 2002) (holding that *Apprendi* does not apply to a court's finding of "extraordinary aggravating factors" under Colorado law and declining to follow *Gould*).

Moreover, several other states are considering adopting sentencing guidelines. *See, e.g., Justice Pushes Indigent Defense*, Augusta Chronicle, Feb. 1, 2003, at B6 (noting that both the Chief Justice of the Georgia Supreme Court and the Governor of Georgia have asked Georgia judges to consider uniform sentencing guidelines proposed recently by a blue-ribbon state commission); *Cut Prison Costs Without Jeopardizing Public Safety*, Roanoke Times & World News, Jan. 23, 2003, at A12 (noting the Governor of Virginia's proposal to create sentencing guidelines); Richard Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L.J. 425, 427 (2000) (noting that at least eight jurisdictions were considering adopting guidelines). Guidance from this Court on how

Apprendi affects the operation of sentencing guidelines will be critically important for these states as well.

Only this Court can resolve the conflict over *Apprendi*'s effect on upward departures from state statutory sentencing guidelines. This issue is a pure question of law concerning the scope of *Apprendi*, and there is nothing to be gained by delaying a final resolution. Allowing the present uncertainty to continue will only aggravate the level of confusion among the practitioners, defendants, judges, and lawmakers who must confront *Apprendi* on a regular basis.

III. Applying *Apprendi* to Upward Departures from *Statutory* State Sentencing Guidelines Would Not Invalidate the Federal Sentencing Guidelines, Which are Promulgated by an Independent Commission Within the Judicial Branch.

The rule set forth in *Apprendi* is confined to facts "that increase the penalty for a crime beyond the prescribed ***statutory*** maximum." *Apprendi*, 530 U.S. at 490 (emphasis added). Thus, this Court has so far limited *Apprendi* to sentencing ranges that are established by legislative acts. *See id.* ("It is unconstitutional for a ***legislature*** to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.") (emphasis added); *id.* at 481 (noting that judges have historically "exercise[d] discretion . . . in imposing a judgment within the range prescribed by ***statute***") (emphasis added).

Washington's sentencing guidelines are established by statute. *See* Wash. Rev. Code § 9.94A.310 (2000). Therefore, *Apprendi* squarely governs sentences that exceed the maximums set by those guidelines. The sentencing ranges in the federal Sentencing Guidelines, on the other hand, are not statutory and are not set by the legislature.

Rather, the federal guidelines are established by the United States Sentencing Commission, an "'independent commission in the judicial branch of the United States.'" *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (quoting 28 U.S.C. § 991(a)).

Because the federal guidelines are the product of "an independent rulemaking body . . . within the Judicial Branch," *id.* at 385, the federal guidelines do not establish "statutory maximum[s]" for purposes of *Apprendi*. 530 U.S. at 490. Thus, deciding that *Apprendi* applies to upward departures from state ***statutory*** sentencing guidelines would not usurp the federal court's role in making findings under the federal sentencing guidelines. This Court may properly leave that latter issue—whether *Apprendi* applies to the federal sentencing guideline ranges—for a later day.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and hold that *Apprendi* applies to upward departures from statutory sentencing guidelines, where such departures are expressly conditioned on the finding of aggravating factors.

Respectfully submitted,

David M. Porter
Counsel of Record
National Association of
Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888

Mary Price
Families Against Mandatory
Minimums
1612 K Street, N.W., Suite 700
Washington, DC 20006
(202) 822-6700

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